

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	No. 05-CV-329-TCK-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S MOTION TO RECONSIDER
AMENDED SCHEDULING ORDER**

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W. A. Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("State"), and respectfully moves for reconsideration of the Court's Amended Scheduling Order (Dkt. No. 1376).

INTRODUCTION

In the State of Oklahoma's Response to Cargill Defendants' Motion for Modification of the Scheduling Order, Plaintiff raised with the Court the issue of the scope of the expert reports to be disclosed regarding damages. Plaintiff had previously raised this issue with Defendants. Defendants failed to respond. Plaintiff highlighted this issue in its response to the Cargill Defendants' motion, explaining:

The language of the current scheduling order is ambiguous in the manner in which it distinguishes between expert reports on matters pertaining to relief versus expert reports pertaining to all other matters besides relief. The State wrote to Defendants on September 20, 2007, expressing its interpretation of the current Scheduling Order on this issue. *See* Exhibit 3. None of the Defendants responded. Accordingly, in any modification of the Scheduling Order, the State requests that the language be clarified to use the terms "Relief-Related Experts" and "Non-Relief-Related Experts."

The State has, accordingly, redlined this clarifying change on the “Events” set out in the table above.

Dkt. No. 1322, at 12, fn. 10.

The Cargill Defendants did finally respond to this issue in their Reply, simply urging the Court to deny any clarification or modification of this term. Dkt. No. 1344, at 9-10. The Amended Scheduling Order did not address this issue. Plaintiff, by this motion, seeks to have the Court reconsider this issue and to clarify its Order to state that all expert reports concerning all relief, will be filed by Plaintiff by January 5, 2009 and by Defendants by March 2, 2009.

The Amended Scheduling Order needs to also be reconsidered regarding the date it sets for the close of all discovery. According to the schedule as now set, discovery closes on the same date that Defendants are required to disclose the last of their expert reports, denying Plaintiff any discovery into those reports. The Order needs to be amended to allow Plaintiff time for expert discovery.

**THE COURT SHOULD CLARIFY ITS ORDER
TO STATE THAT THE SECOND ROUND OF EXPERT REPORTS
COVERS REPORTS ADDRESSING ALL RELIEF**

The logical divide in the pretrial preparation of this case is a first phase addressing proof of causation and injury and a second phase addressing the relief sought, including the remedies that address the injuries. It follows logically that before anyone can opine as to how to clean up the IRW or what the measure of damages should be, the injuries caused by Defendants’ conduct must first be defined. Setting out expert opinions as to what injuries Defendants are responsible for must come before any remedy can be defined.

The clarified order as sought by Plaintiff would set out an orderly progression of first, the injury being defined, and then, a full remedy for that injury, with expert reports describing the mix of relief and damages which will restore the resource and compensate the State for its losses.

As a practical matter, the relief is not so easily segregated between “damages” and other remedies, which would be the effect of the current scheduling order if “damages” is read narrowly as meaning only a monetary judgment. In addition to a permanent injunction stopping Defendants’ destructive conduct, other relief needs to be examined in light of what the experts find as to the injuries suffered. Inevitably, in this phase of the litigation, these other remedies will interact with the damages remedy. In light of the seriousness of the injuries as defined by the expert reports to be filed by Plaintiff by April 1, 2008, it will likely be necessary to present expert reports regarding remedies designed to cleanup or mitigate injuries caused by Defendants’ waste disposal activities. Such reports may contain information on feasibility, costs and effectiveness of the remedy. For example, certain management practices such as buffer strips and riparian easements may slow the transport of phosphorus from land application sites to the waters of the IRW and might be judged by some experts to be an important part of a remedial plan. The cost of those management practices, while perhaps not a traditional “damage,” could be a part of a complete remedy for the Defendants’ longstanding and improper waste disposal practices. Such issues could directly impact the monetary judgment portion of the relief..

While some work on the relief can be done before the final assessment of the injury is made, there are key parts of the remedial design that cannot be analyzed until the

expert injury reports are completed. As with the expert monetary damage reports, the State requires time after submission of the expert injury reports to complete its relief-related expert reports.

Plaintiff originally urged this division on the Court in order to expedite the case and provide Defendants with its expert reports concerning causation and injury at the earliest point in time and not make Defendants wait until Plaintiff's relief-work is complete. However, a narrow reading of the current Scheduling Order threatens that plan. It will work to either delay the case or unduly prejudice Plaintiff. Clearly, neither of these was the intent of the Court in setting out the schedule, nor were they Plaintiff's wish when it made its suggestions concerning this manner of case organization.

On the other hand, defining the expert reports to be filed by Plaintiff on January 5, 2009 and by Defendants March 2, 2009 as those addressing all forms of relief, will neither delay the case nor prejudice either of the parties. It will allow the case to be tried as quickly as possible and facilitate orderly discovery.

**THE SCHEDULING ORDER SHOULD BE AMENDED
TO PROVIDE PLAINTIFF WITH DISCOVERY OF
DEFENDANTS' EXPERT REPORTS**

The Amended Scheduling Order provides that Defendants are to disclose their expert report as to "damages" on March 2, 2009, the same day when discovery is closed. Plaintiff should be allowed reasonable discovery of these reports, including an opportunity to conduct depositions or other appropriate discovery on these reports. Plaintiff therefore suggests to the Court that it allow Plaintiff 60 days to complete its

discovery related to Defendants' final expert reports.¹ There is no reason why all other discovery should not be completed by March 2, 2009.

CONCLUSION

In order to address the issues raised in the pleadings and argument of counsel concerning the Scheduling Order, the State respectfully requests this Court to reconsider its Order and to address the issue of the Court's intent when setting dates for the filing of expert reports as to "damages," and, upon reconsideration, to order that those dates apply to the filing of expert reports as to all forms of relief and to further allow Plaintiff 60 days after Defendants file their reports concerning remedy for discovery relevant to those reports.

Respectfully Submitted,

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¹ The State suggests that the dispositive motion deadline be pushed back to May 15, 2009, to take into account this movement in the deadline for discovery into Defendants' expert witnesses pertaining to "damages." The State submits no other dates need to be adjusted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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